In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1482

FRANK BOLETTIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on a one-count indictment charging the purchase of 997 grams of methadone not in or from the original stamped package, in violation of 26 U.S.C. 4704(a) (A. 1a, 2a).[1] He was sentenced to imprisonment for five years pursuant to 18 U.S.C. 4208(a)(2) (A. 1a). The court of appeals affirmed unanimously without an opinion.

Petitioner's contentions relate solely to his allegedly

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[1] "A." refers to the printed Appendix filed with the Clerk of this Court.

unlawful arrest and the evidence seized and incriminating statements made by him in connection therewith. At the hearing on petitioner's pretrial motion to suppress,[2] agent O'Brien of the Federal Bureau of Narcotics and petitioner were the only witnesses. The testimony showed that in the latter part of January 1968, an informant told agent O'Brien that one Frankie Butch was trafficking in heroin (A. 6a).[3] The informant furnished Frankie's telephone number, which was listed in petitioner's name (A. 6a). O'Brien then initiated a surveillance of petitioner, which continued until his arrest on June 15, 1968 (A. 120a-121a). During this period agents observed petitioner, a letter carrier, making numerous stops of two hours or more at the Ponce Funeral Home, which had been frequented by members of the Brooklyn underworld and was the subject of an active file at the Bureau of Narcotics (A. 9a-10a, 12a-13a, 124a).

On May 13, 1968 petitioner, followed by agent O'Brien, drove from his home to a diner and parked next to an automobile registered to one John Tommaro (A. 16a-17a). O'Brien knew of this registration and that Tommaro's employer was on the National Violator List of top narcotics offenders (A. 17a). In the diner O'Brien and another agent overheard petitioner ask Tommaro if he had the "stuff."[4] When Tommaro re-

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[2] Petitioner does not challenge the trial proceedings themselves.

[3] The informant had previously given O'Brien information that had resulted in one conviction and three arrests; he was to be used in other cases still pending at that time (A. 35a, 38a).

[4] O'Brien testified that he understood the word "stuff" to mean narcotics (A. 69a-70a).

plied that he had brought it, petitioner asked how good it was. Tommaro answered, "Take a sample and test it" (A. 18a). The two then went outside, where Tommaro took from his car a white package and gave it to petitioner (A. 18a-19a, 78a). The agents followed petitioner to the home of his brother-in-law, who took the package from petitioner's car into the house (A. 20a, 80a-82a). O'Brien did not then arrest petitioner since he hoped to reach the ultimate source of the narcotics (A. 20a-21a).

In early June 1968 the informant told O'Brien that petitioner would purchase narcotics from Tommaro at an unspecified funeral parlor (A. 24a, 82a, 84a). The informant advised that petitioner and the manager of the Ponce Funeral Home had quarreled and that the Ponce Home was no longer used for narcotics traffic (A. 21a-22a). The Federal Bureau of Narcotics believed that the Moscarelli Funeral Home in Brooklyn, which was reputed in the 1950's and 1960's to be a center for narcotics activities, was presently being used for that purpose (A. 22a-23a). Accordingly a surveillance was established of the Moscarelli Home.

On June 15 the informant told O'Brien that petitioner was going to purchase a quantity of drugs that day (A. 26a, 87a-88a). At about 2:00 p.m. petitioner drove his car from his home to a diner in Queens where he met two men (A. 26a, 89a-90a). After a short conversation with them petitioner drove away in another car, a 1963 Chevrolet (A. 26a-27a, 90a-91a). Other agents followed petitioner, and O'Brien drove to the Moscarelli Home, where he saw Tommaro and the

Moscarelli brothers in front (A. 27a-28a). When O'Brien walked past these men he overheard Louis Moscarelli say, "Where the hell is Frankie? I hate to keep that stuff too long". Louis Moscarelli then drove off (A. 28a, 96a).

O'Brien was informed by the agents following petitioner that he was then around the corner from the funeral home. O'Brien saw petitioner sitting in the Chevrolet counting a large number of bills (A. 28a-29a, 98a-99a). After O'Brien walked back to the funeral home he saw Louis Moscarelli return, remove from the trunk of his car a paper bag with a red emblem on its side, and enter the home (A. 29a, 101a-102a). A few minutes later Louis came out of the home without the bag and rejoined Tommaro and his brother Ralph (A. 30a, 95a-96a). Petitioner drove up, got out of his car, and all four went into the home (A. 30a-31a). As they entered the building O'Brien heard one Moscarelli brother say to petitioner, "Next time be on time or get the package elsewhere" (A. 30a).

Shortly afterward Louis Moscarelli came out of the home with a paper bag and walked into the funeral parlor garage. Petitioner drove the Chevrolet about halfway into the garage and was seen accepting a package from Louis Moscarelli (A. 31a, 102a, 104a). Petitioner then drove away and was stopped by two government cars a few blocks from the funeral home (A. 31a-32a, 112a-113a). Agent O'Brien arrested petitioner, removed him from the car, and seized a paper bag with a red emblem from the floor of the car next to the driver's side (A. 32a). The agents did not have an

arrest or search warrant (A. 4a, 121a). Subsequent chemical analysis showed that the package contained methadone (A. 32a).

Agent O'Brien placed petitioner in a government car, and told him that he (O'Brien) was a federal agent and that petitioner was under arrest for violation of the federal narcotics laws. O'Brien advised petitioner: "You have the right to remain silent, you do not have to say anything to me and you have the right to have a lawyer—you have the right to have a lawyer at any time during any proceeding and should you not have the money to afford a lawyer, the Court will appoint one for you." Petitioner laughed and said, "Yeah, just like they do in the Sunday night movies." O'Brien asked what was in the bag, to which petitioner replied, "You know, it's junk" (A. 189a). When petitioner inquired as to what he could do to help himself, the agent answered that he wanted to get Louis Moscarelli. Petitioner agreed to cooperate in this. Petitioner then related how he had purchased the narcotics from Louis Moscarelli for $5,500 (A. 190a-194a).[5]

The district court denied the motion to suppress the seized narcotics and petitioner's post-arrest statements (A. 184a, 247a). The court concluded that there was probable cause for the arrest (A. 184a):

* * * The totality of what [agent O'Brien] saw

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[5] At the suppression hearing petitioner testified on his own behalf that he had not been warned of his constitutional rights (A. 216a-217a) and that he did not tell any government agent he had purchased the narcotics in question (A. 219a).

> over the period in which he saw it amounted to overwhelming evidence that the time to act had come and that it would have been unreasonable, without some satisfactory explanation, for Mr. O'Brien and his fellows not to have moved in and [do] what they did when they did it.

Petitioner asserts that his warrantless arrest was without probable cause and therefore unlawful, and that the district court erred in not suppressing the evidence seized and his post-arrest statement. But the circumstances detailed above plainly established probable cause for petitioner's arrest without a warrant and the incident seizure of the package from the immediate area petitioner had occupied as driver of the car. See 26 U.S.C. 7607(2); *Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132; *United States* v. *Acarino,* 408 F. 2d 512 (C.A. 2), certiorari denied, 395 U.S. 961.

Nor is there substance to petitioner's claim that his post-arrest incriminating statements were made as a result of an illegal interrogation and were given involuntarily (Pet. 9). Immediately following his arrest petitioner was advised of his constitutional rights in accordance with the requirements of *Miranda* v. *Arizona,* 384 U.S. 436. According to agent O'Brien, petitioner indicated that he understood these rights before he made the incriminating statements (A. 189a, 190a, 194a). The trial court obviously disbelieved petitioner's testimony to the contrary, finding that petitioner's statements were "* * * neither coerced nor

obtained without adequately advising the defendant of his rights * * *" (A. 247a).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

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[6] Although there was testimony that agent O'Brien drew his gun at the time of petitioner's apprehension (A. 115a), there is no evidence that petitioner's later incriminating statements were made at the "point of a gun," as the petition suggests (Pet. 9).

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